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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CESAR PULIDO et al., Defendants and Appellants.	E055364 (Super.Ct.No. FSB800668) **OPINION**

APPEAL from the Superior Court of San Bernardino County. Michael A. Smith, Judge. (Retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed with directions.

Leslie Conrad, under appointment by the Court of Appeal, for Defendant and Appellant Cesar Pulido.

Kimberly Grove, under appointment by the Court of Appeal, for Defendant and Appellant, Mike Garcia Jr.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, and Barry Carlton and Jennifer B. Truong, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants Cesar Pulido and Mike Garcia Jr., who were both 16 years old at the time, broke a bathroom window to gain access to 87-year-old Storma Del Andrae's mobile home. Pulido entered through the window and encountered Del Andrae. He proceeded to hit her in the head with a hammer, denting her skull. He used the hammer to break her fingers in order to get her to disclose the combination to her safe but she was unable to respond. Pulido let Garcia Jr. into the mobile home and they both stole her money and jewelry. Del Andrae was discovered the following day still alive. She remained in a coma until she succumbed to her injuries two weeks after the incident.

Defendants were convicted of first degree murder with special circumstances, robbery, burglary, elder abuse and assault with a deadly weapon. Both defendants were sentenced to Life Without the Possibility of Parole (LWOP).

Defendants now claim on appeal as follows:

1. Both defendants contend that remand for resentencing is required in order for the trial court to consider their LWOP sentences in light of the recent United States Supreme Court case *Miller v. Alabama* (2012) 567 U.S. ____ [132 S.Ct 2455, 183 L.Ed.2d 407] (*Miller*).

2. Pulido, joined by Garcia Jr., contend that the sentencing scheme (§ 190.5, subd. (b)) under which they were sentenced to LWOP is facially unconstitutional.

3. Garcia Jr., joined by Pulido, contend that pursuant to Penal Code section 1157[1] their convictions of first degree robbery and first degree burglary must be reduced to second degree as the jury failed to explicitly determine the degree of the crimes.

4. Garcia Jr. and Pulido contend the parole revocation fine imposed pursuant to section 1202.45 should be stricken because they are not eligible for parole.

We reduce their first degree robbery convictions to second degree. We vacate their LWOP sentences and remand for resentencing. In all other respects, we affirm the judgment.

I

PROCEDURAL BACKGROUND

Defendants were tried together before separate juries. As to both defendants, they were found guilty in count 1 of first degree murder. For this count, the jury found true the special circumstance allegations that they committed murder during the commission of robbery (§ 190.2, subd. (a)(17)(A)) and burglary (§ 190.2, subd. (a)(17)(G)). The jury also found defendants guilty of the crime of robbery (§ 211) as charged in count 2 and burglary (§ 459) in count 3. They were both found guilty of elder abuse (§ 368, subd. (b)(1)) in count 4 and assault with a deadly weapon (§ 245, subd. (a)) in count 5.

As to counts 2, 3, 4 and 5, the jury found true the special allegations against Pulido that he caused great bodily injury (§ 12022.7, subd. (c)) and caused the victim to be in a comatose state (§ 12022.7, subd. (b)); they found the allegations not true against Garcia

[1] All further statutory references are to the Penal Code unless otherwise indicated.

Jr. As to count 4, the jury found against Pulido only the special allegation that he caused great bodily injury resulting in death (§ 368, subd. (b)(3)(B)).[2]

Defendants were both given an LWOP sentence pursuant to section 190.5, subdivision (b) for the first degree murder. All of the remaining sentences and special allegations were stayed pursuant to section 654. The court imposed a $2,000 restitution fine (§ 1202.4) and a stayed parole revocation fine in the same amount (§ 1202.45).

II

FACTUAL BACKGROUND

A. *People's Case-in-Chief*

1. *Evidence of Del Andrae's murder presented to both juries*

In 2008, Del Andrae was 86 or 87 years old and lived in a mobile home located on Highland Avenue in San Bernardino. Del Andrae used a cane and a walker. Robert Logsdon had known Del Andrae since 1970. Del Andrae and Logsdon attended the same church in San Bernardino. Del Andrae hired Garcia Jr. (whose family also attended the church) to do yard work at her house in late 2007 and early 2008. At some point, Del Andrae no longer used Garcia Jr. for her yard work.

On February 12, 2008, at around 3:00 p.m., Logsdon went to Del Andrae's mobile home to take her to a doctor's appointment. The front door was unlocked and Logsdon called for her but did not receive an answer. Logsdon went inside and immediately

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[2] The trial court granted defendants' section 1118.1 motion to dismiss the special circumstance allegations under section 190.2, subdivisions (a)(1), (a)(14), and (a)(15) which had also been alleged.

noticed that her safe (which was normally kept in a bedroom closet) was in the laundry room on top of either the washer or dryer. In her bedroom, drawers were open and some drawers were on the floor. This was not how Del Andrae normally kept her home.

Logsdon then discovered Del Andrae's body. Del Andrae was unconscious and her body was shaking at times. She was unresponsive. He lifted her head and discovered she was bleeding from the back of her head. She was wrapped in a sheet and a blanket. There was blood everywhere. She was transported to the hospital.

San Bernardino Police Detective William Flesher walked through Del Andrae's mobile home. The trunk and hood of the car parked in the driveway were ajar. The hood had what looked like "claw" marks as if someone had tried to pry open the hood. Her safe had been moved from the closet to the laundry room. There were pry marks on the safe. There were blood stains and a pool of blood on the carpet. There was blood spatter on the bedroom door and also on a wall close to where the pool of blood was found. Based on the blood splatter, it appeared she had been attacked in one area. Drawers were taken out of the dresser and nightstand. Her purse was on the bed.

Drawers were pulled from a jewelry box. There was a depression in the carpet under the bed where it appeared a suitcase had been stored. Cabinets in the living room were open and the contents strewn onto the sofa. Alcohol bottles appeared to be missing. Entry to the mobile home was made by a small window in the bathroom. A towel rack had been pulled away from the wall in the bathroom.

After being in a coma for two weeks, Del Andrae died and an autopsy was performed on her body on March 3, 2008. Del Andrae had recently broken fingers on both hands. There were tears in the skin where blunt force trauma was applied to cause the breaks. It was consistent with a hammer striking the fingers. She had blunt force injuries to her wrist. She had a laceration on her thumb.

A large part of her skull had been removed to alleviate the bleeding in her brain. She had numerous lacerations on the right side of her head. She had fractures in her skull where these lacerations were evident. There were a total of nine lacerations on Del Andrae's skull. There were three indents in Del Andrae's skull where some of the lacerations were present. The bones were broken and dented inward. The indentations were consistent with blunt force trauma caused by being hit in the head with a hammer. A great amount of force was required to cause the skull to fracture.

Del Andrae's cause of death was determined to be blunt force trauma to the head. Pulido and Garcia Jr. were arrested.

2. *Pulido jury only*

San Bernardino Police Sergeant Timothy Crocker arrested Pulido in Arizona. Sergeant Crocker spoke with Pulido on the drive from Arizona to California. Pulido asked whether the victim was still alive. Sergeant Crocker told him that she was alive. Pulido then said something like he was glad "that fool didn't kill her."

Detective Crocker interviewed Pulido at the San Bernardino police station. Pulido was born on February 6, 1992. Garcia Jr. told Pulido that he knew an "old lady" who had money and that she lived in a mobile home by herself; Garcia Jr had previously worked

for her. They agreed to go to her mobile home. Garcia Jr. had a hammer. Garcia Jr. picked up another hammer on the way to Del Andrae's house. Pulido claimed he was to act as the lookout. Pulido initially stated that Garcia Jr. was the only one who went inside the mobile home, and that Garcia Jr. took a suitcase and hit Del Andrae with a hammer. Pulido heard someone inside the mobile home being hit. Garcia Jr. told Pulido that Del Andrae was unconscious. Pulido saw blood on the hammer. Garcia Jr. tried to start the car but was unsuccessful.

Later in the interview, Pulido admitted he went into the mobile home, but claimed he only stepped one foot inside, saw Del Andrae covered with a sheet, and there was blood on the sheet and the rug. Garcia Jr. stuffed his pockets with items from the home. They planned to put the safe in the car but the car would not start.

Pulido eventually admitted that he broke the bathroom window, entered through the window, and opened the front door for Garcia Jr. Garcia Jr. came in and hit Del Andrae with a hammer. Pulido estimated Garcia Jr. hit her more than 20 times. Pulido admitted he helped Garcia Jr. put Del Andrae's jewelry in a suitcase. Pulido claimed he threatened to hit Garcia Jr. if he did not stop hitting Del Andrae. Pulido was crying during the interview saying he should have never gone with Garcia Jr.

Pulido finally stated that Garcia Jr. was hitting her and he told Pulido to hit her. Pulido hit her only three times. Garcia Jr. hit Del Andrae on the hands with the hammer trying to get her to tell him where her keys were and to give up her credit card security codes. Garcia Jr. took her credit card and money from her wallet.

Pulido told his mom, Maria Hernandez, where he got the jewelry. He admitted he had gold chains that were taken from Del Andrae and they were under his bed. He gave his girlfriend, Cecilia Barajas, some of the jewelry. Pulido claimed that he went to Arizona to find work and not to avoid the police.

3. *Garcia Jr. jury only*

Garcia Jr. was interviewed shortly after February 12, 2008. Garcia Jr. initially denied any involvement in the crime. Garcia Jr. was again interviewed by Detective Flesher on February 14, 2008. Garcia Jr. was born on October 19, 1991.

Garcia Jr. worked for Del Andrae until she accused him of taking her money. Garcia Jr. told Pulido that Del Andrae had lots of money and it was Pulido's idea to take her money. Pulido broke the window to the mobile home and went inside. He then told Garcia Jr. that he hit Del Andrae with a hammer when she emerged from her bedroom. Garcia Jr. was let in the door by Pulido. Garcia Jr. saw her on the floor with blood around her. He went directly into her bedroom. He took her jewelry. Pulido had already covered Del Andrae with the blanket. Pulido tried to start the car so they could take the safe but it would not start. Garcia Jr. put jewelry in his pockets.

Pulido kept hitting Del Andrae asking for her car keys and the code to the safe. Garcia Jr. denied that he hit Del Andrae. To get home, they took a cab from a nearby Chevron gas station and used money taken from Del Andrae's wallet to pay for the cab.

Before going to Del Andrae's house, Garcia Jr. told Pulido that he did not want to kill her. Garcia Jr. admitted telling Pulido to knock out Del Andrae if he had to. During the interview, Garcia Jr. was crying and sobbing.

Shoes belonging to Garcia Jr. were recovered and one had a red mark on it. Gloves that Garcia Jr. had been wearing in the mobile home were found behind the Chevron gas station.

4. *Evidence presented to both juries regarding police investigation*

Logsdon identified photographs of jewelry found in the possession of Pulido, Barajas, and Garcia Jr. as belonging to Del Andrae.

Garcia Jr.'s father found a bag containing jewelry in a shed on his property. Garcia Jr. told his father he had gotten it from a burglary or robbery but he had used gloves so he would not be caught. Garcia Jr.'s father found out about Del Andrae and thought the jewelry had come from her. He called the police.

A suitcase containing baggies of jewelry along with a tag bearing Del Andrae's name was turned over to the police by Pulido's mother. Barajas was photographed wearing earrings, a necklace, and a ring belonging to Del Andrae.

On February 12, 2008, Bodunria Harrison picked up Pulido and Garcia Jr. from the Chevron gas station. They had a bicycle and a black suitcase. They were wearing jewelry and Harrison commented that it did not look real. Pulido said he did not wear fake jewelry. Pulido told Harrison that he had beat up the owner of the jewelry to get it. Pulido and Garcia Jr. were both laughing.

Nelson Luis Soto knew both Garcia Jr. and Pulido. Soto had a girlfriend who worked at a pawn shop. Pawn tickets for jewelry belonging to Del Andrae were seized at his house. Soto bought Pulido a bus ticket in Soto's name. Soto claimed he bought the

ticket because Pulido did not have identification, and because Pulido wanted to visit his family in Arizona.[3]

B. *Defense*[4]

Garcia Jr. began using drugs when he was 12 years old. He abused marijuana, methamphetamine, and alcohol. When he was 14 years old, he broke a window to get into a vacant house. He was under the influence of marijuana at the time. He was convicted of vandalism of the house and a car that was onsite (he broke a window on the car), along with trespass. In 2006, he broke a window at a house and reached in to break a bowl filled with fruit because he had nothing else to do. He was under the influence of marijuana at the time. He never received drug treatment. Once out of juvenile hall, he violated probation several times. He continued using marijuana and methamphetamine.

On the day he went to Del Andrae's house, he had marijuana prior to going to Soto's house. While at Soto's house, he had more marijuana, methamphetamine, and beer. He proclaimed he was "heavily" under the influence. Garcia Jr. came up with the idea to go to Del Andrae's house to see what they could steal. He had no intention of harming her. Garcia Jr. denied hitting Del Andrae with the hammer. Garcia Jr. could not get through the bathroom window. Garcia Jr. admitted taking money, jewelry, and trying to move the safe. Pulido could not get the car started after Garcia Jr. pointed to a set of keys in the mobile home.

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[3] Soto told Detective Flesher that he bought a ticket for Pulido because Pulido told him he was involved in some "shit" and needed to get out of California.

[4] Both juries were present for all of the defense testimony.

Garcia Jr. had been drug free for more than a year. Garcia Jr. was "sad" about what had happened. He was out of control because of the drugs.

Pulido also testified. On the day of the incident, he smoked pot, took methamphetamine, and drank. He used marijuana on a daily basis starting when he was 13 years old. On the day of the incident, Pulido was on his fourth day of no sleep because he was on a "run," which he explained meant using methamphetamine for several days in a row. He used methamphetamine at Garcia Jr.'s house, at a park, and at a party.

At some point, Pulido told Garcia Jr. that he needed money for more drugs. Garcia Jr. suggested Del Andrae's house. They agreed to enter and steal her purse. When they arrived, Pulido was the only one that fit through the window. Pulido ran to the front door and opened it for Garcia Jr. Garcia Jr. entered and hit Del Andrae with a hammer. Garcia Jr. "snapped." Pulido lied about hitting Del Andrae three times because he felt pressured by Sergeant Crocker.

C. *Rebuttal*

Since the interviews were previously only played to the individual juries, the People presented to both juries the inconsistent statements made by both Garcia Jr. and Pulido in the interviews with police.

III

DEFENDANTS' LWOP SENTENCES CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AMENDMENT

Defendants collectively and individually argue that their LWOP sentences violate the Eighth Amendment's ban on cruel and unusual punishment as recently stated in *Miller, supra*, 567 U.S. ___ [132 S.Ct. 2455]. They additionally argue that the provisions of section 190.5, subdivision (b) are unconstitutional because it mandates the imposition of LWOP sentences on juveniles.

A. *Sentencing*

Defendants were sentenced on December 30, 2011. Victim impact statements were given and it was expressed that the two defendants should go to prison until they died. The prosecutor stated that he would "leave to the Court's discretion as to the imposition of the life without possibility of parole, that is the presumptive, given the code section and the special circumstances allegations that were found true." The prosecutor then referred to *People v. Blackwell* (2011) 202 Cal.App.4th 144. In *Blackwell*, the People argued, defendant was 16 years old, was found guilty of the robbery and burglary with special circumstances, and the appellate court upheld the LWOP sentence.[5]

In sentencing Pulido, the court first noted that the jury was properly instructed on the special circumstance allegations. It also noted there was ample evidence to support the allegations. It then held, "So, as to Cesar Pulido, as to the charge of murder in the

[5] We note that the *Blackwell* case was decided prior to *Miller*.

first degree, violation of Penal Code section 187 with the special circumstance allegations that the murder was committed while the defendant was engaged in the commission of robbery and burglary, within the meaning of Penal Code section 190.2(a)(17), or 15, the Court will sentence the defendant to the California state prison for the term of life in prison without the possibility of parole." The trial court then imposed the remaining stayed sentences on the other counts. As for Garcia Jr., the trial court stated, "And, then, as to the defendant Mike Garcia, for the offense of first degree murder, violation of Penal Code section 187, with the special circumstance allegations of murder committed while engaged in the commission of robbery and burglary, within the meaning of Penal Code section 190.2(a)(15) and (17), the Court will sentence the defendant to the California state prison for the term of life in prison without the possibility of parole." There was no on-the-record statement by the trial court as to why it was imposing the LWOP sentences other than that the special circumstances were found true.

B. *Defendants' LWOP Sentences Constitute Cruel and Unusual Punishment - Resentencing in Light of Miller*

Defendants were sentenced under section 190.5, subdivision (b), which provides as follows: "The penalty for a defendant found guilty of murder in the first degree, in any case in which one or more special circumstances . . . has been found to be true . . . who was 16 years of age or older and under the age of 18 years at the time of the commission of the crime, shall be confinement in the state prison for life without the possibility of parole or, at the discretion of the court, 25 years to life."

This provision has been judicially construed to establish a presumption that LWOP is the appropriate term for a 16- or 17-year-old defendant, and to make an LWOP sentence "generally mandatory." (*People v. Guinn* (1994) 28 Cal.App.4th 1130, 1141-1142; see also *People v. Murray* (2012) 203 Cal.App.4th 277, 282; *People v. Ybarra* (2008) 166 Cal.App.4th 1069, 1089.)

In *Roper v. Simmons* (2005) 543 U.S. 551, 578 the United States Supreme Court invalidated the death penalty for all juvenile offenders under the age of 18 years. In *Graham v. Florida* (2010) 560 U.S. ___ [130 S.Ct. 2011, 176 L.Ed.2d 825], the United States Supreme Court held the Constitution categorically bars an LWOP sentence for nonhomicide offenses committed by a minor, and if a life sentence is imposed, "it must provide him or her some realistic opportunity to obtain release before the end of that term." (*Graham v. Florida*, *supra*, 130 S.Ct. at p. 2035.) In *Miller, supra,* 132 S.Ct. 2455, the high court held the Eighth Amendment bars a mandatory LWOP sentence for murder committed by a minor. (*Miller,* at p. 2475.)

Miller stated, "So *Graham* and *Roper* and our individualized sentencing cases alike teach that in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult. To recap: Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features - - among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him - - and from which he cannot usually extricate himself - - no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his

participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth - - for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. . . . And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it." (*Miller, supra,* 567 U.S. ___ [132 S.Ct. at p. 2468].)

Miller further stated, "We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders. [Citation.]" (*Miller, supra,* 567 U.S. ___ [132 S.Ct. at p. 2469].)

Miller continued, "By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment. Because that holding is sufficient to decide these cases, we do not consider [the] . . . alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger. But given all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the *rare juvenile offender whose crime reflects irreparable corruption.*' [Citations.] Although we do not foreclose a sentencer's ability

to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison. [Fn. omitted.]" (*Miller, supra,* 567 U.S. _____ [132 S.Ct. at p. 2469], italics added.)

Here, the trial court was advised by the People that the LWOP sentence was presumptive. We cannot presume the trial court, during sentencing, considered the factors discussed in *Miller* because the case postdated defendants' sentencing. The record fails to demonstrate the trial court actually considered the factors discussed in those cases. As noted, case law at the time of sentencing presumed in favor of the LWOP sentence. Accordingly, the record fails to demonstrate the court considered those factors set forth in *Miller*. We conclude section 190.5, subdivision (b) was, in defendants' cases, unconstitutional as applied, effectively resulting in mandatory LWOP sentences that violated *Miller*.

Defendants are entitled to be resentenced. While *Miller* does not bar the imposition of an LWOP sentence, the trial court must take into account the age of defendants, each defendant's participation in the crime, and each of their home environments. (*Miller, supra,* 567 U.S. ___ [132 S.Ct. at p. 2469].) We conclude remand is necessary so the court can reconsider the appropriate sentence on the murder count without reference to a presumption in favor of LWOP and with the benefit of the *Miller* opinion. (See *People v. Ramirez* (2013) 219 Cal.App.4th 655, 688-689.)

We note - - although not raised by respondent - - recent amendments to California's sentencing law have provided defendants with the opportunity to seek parole.

Subject to exceptions not relevant here, section 1170, subdivision (d)(2)(A)(i) retroactively permits a defendant who was sentenced to LWOP for a crime committed as a juvenile to petition the court for recall and resentencing after serving at least 15 years of that sentence. This provision offers the possibility of relief some 15 years in the future, but it does not remediate the problem here. Here, imposition of the LWOP sentences was contrary to the ruling in *Miller*, and was made under the assumption that LWOP was the presumptive term for 16-year-old defendants convicted of special circumstance murder. Moreover, there is no guarantee that such provision will be available to defendants in 15 years. As such, defendants are entitled to remedy the Eighth Amendment violation at this time.

C. *Section 190.5, Subdivision (b) Is Not Facially Unconstitutional.*[6]

Defendants argue that their LWOP sentences violate the Eighth Amendment, in part because section 190.5, subdivision (b) is unconstitutional in light of *Miller*. Since we are remanding for resentencing, we briefly address whether the section is facially unconstitutional under the Eighth Amendment.

As set forth, *ante*, section 190.5, subdivision (b) provides, in relevant part, that the penalty for a defendant between the ages of 16 and 18 years found guilty of murder in the

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6 The California Supreme Court is currently considering the constitutionality of LWOP sentences imposed under Penal Code section 190.5 in light of *Miller*. (*People v. Moffett* (2012) 209 Cal.App.4th 1465, review granted Jan. 03, 2013, S206771 and *People v. Gutierrez* (2012) 209 Cal.App.4th 646, review granted Jan. 03, 2013, S206365.)

first degree with special circumstances "shall be confinement in the state prison for life without the possibility of parole or, at the discretion of the court, 25 years to life." This provision has been judicially construed to establish a presumption that LWOP is generally mandatory. (*People v. Guinn*, *supra*, 28 Cal.App.4th at pp. 1141-1142; see also *People v. Murray*, *supra*, 203 Cal.App.4th at p. 282; *People v. Ybarra*, *supra*, 166 Cal.App.4th at p. 1089.)

"As a general rule, a statute is 'facially unconstitutional' if it conflicts so directly with a constitutional provision that the statute is completely invalid and unenforceable in all circumstances." (*People v. Rodriguez* (1998) 66 Cal.App.4th 157, 166.) Section 190.5, subdivision (b) differs from the mandatory schemes found unconstitutional in *Miller* because it gives the court the discretion to impose a term that affords the possibility of parole in lieu of an LWOP sentence. Even if section 190.5, subdivision (b) creates a presumptive LWOP sentence, a trial court *could* exercise its discretion under section 190.5, subdivision (b), consider all the factors discussed in *Miller*, and then elect to impose a prison sentence of 25 years to life. Under such circumstances, an LWOP sentence is not mandatory and the resulting sentence would not violate the Eighth Amendment. The subdivision is not facially unconstitutional.

As a final note, we do not express an opinion as to the appropriate outcome in sentencing upon remand but the sentencing choice must be without regard to decisional law making LWOP the presumptive term. Moreover, the trial court should consider the factors in *Miller*, as set forth *ante*. The trial court on remand may reconsider defendants' entire sentences.

IV

FIRST DEGREE BURGLARY AND ROBBERY REDUCED TO SECOND DEGREE

Garcia Jr., joined by Pulido, contend that pursuant to section 1157 their convictions of first degree burglary and robbery must be reduced to second degree because the jury failed to determine the degree of the crimes. Respondent concedes that the first degree robbery conviction must be reduced to second degree. However, since the jury was only instructed on first degree burglary, respondent contends that the jury could only find defendants guilty of first degree burglary. We agree that defendants' robbery conviction must be reduced to second degree, but reject defendants' claims as to the burglary.

A. *Additional Factual Background*

Defendants were charged in the information with first degree residential robbery and first degree residential burglary. Both juries were instructed on first and second degree robbery. Both juries were only instructed on first degree residential burglary. The verdict forms stated, "We the jury, in the above-entitled action find the defendant, CESAR PULIDO, guilty of the crime of Burglary, as charged in Count 3" and "We the jury, in the above-entitled action find the defendant, CESAR PULIDO, guilty of the crime of Robbery, as charged in count 2." Garcia Jr.'s verdict forms were identical save the name.

B. *Analysis*

Section 1157 states: "Whenever a defendant is convicted of a crime or attempt to commit a crime which is distinguished into degrees, the jury, or the court if a jury trial is waived, must find the degree of the crime or attempted crime of which he is guilty. Upon the failure of the jury or the court to so determine, the degree of the crime or attempted crime of which the defendant is guilty, shall be deemed to be of the lesser degree."

"[T]he key is not whether the 'true intent' of the jury can be gleaned from circumstances outside the verdict form itself; instead, application of [section 1157] turns only on whether the jury specified the degree in the verdict form." (*People v. McDonald* (1984) 37 Cal.3d 351, 382, overruled in part by *People v. Mendoza* (2000) 23 Cal.4th 896 (*Mendoza*); see also *People v. Beamon* (1973) 8 Cal.3d 625, 629, fn. 2, [collectively *McDonald-Beamon*].) "Under the *McDonald-Beamon* rule, a jury in a criminal case is required to determine the degree of the crime and if it does not, the offense is deemed to be of the lesser degree. [Citations.]" (*In re Birdwell* (1996) 50 Cal.App.4th 926, 928.) "Even if it is obvious that the jury intended to find [the greater degree], the *McDonald-Beamon* rule focuses solely on the actual verdict and does not take into account any extrinsic evidence or findings. [Citations.]" (*Id.* at p. 930.) "[T]he '*McDonald-Beamon* rule,' although criticized for its inflexibility, continues to be the law of this state. [Citations.]" (*Id.* at p. 929.)

Based on the verdicts, the jury did not decide the degree of the robbery and burglary. The juries were both instructed that robbery is divided into degrees and that they had to determine whether defendants committed first or second degree robbery.

However, the jury was not given a verdict form in order to make a determination of the degree for the robbery. As such, defendants' robbery convictions must be reduced to second degree as they are currently reflected on the abstract of judgment as first degree robbery. However, as to the first degree burglary conviction, reduction to second degree is not mandated by section 1157 and the *McDonald-Beamon* rule.

McDonald was overruled in part by *Mendoza, supra,* 23 Cal.4th 896 to the extent it applied when "the trial court correctly instructs the jury only on first degree murder and to find the defendant either not guilty or guilty of first degree murder." (*Id.* at p. 910.) In *Mendoza*, the jury was instructed solely on first degree murder and no other theory of homicide. (*Id*. at p. 901.) "Under these circumstances, as a matter of law, the *only* crime of which a defendant may be convicted is first degree murder, and the question of degree is not before the jury. As to the degree of the crime, there is simply no determination for the jury to make." (*Id*. at p. 910.) "[S]ection 1157 does not apply where the *jury instructions* accurately and correctly given do not permit the jury to consider or return a . . . conviction other than of the first degree." (*Id.* at p. 910, fn. 5.)

In the present case, the parties agreed prior to the instructions being given to the jury that rather than instruct the jury on first and second degree burglary, it would only instruct the jury as to first degree residential burglary. In the instructions, the jury was advised "The defendant is charged in Count 3 with first-degree residential burglary, a violation of Penal Code section 459." The jury was advised as an element of the crime that defendants had to have "entered an inhabited dwelling house." There were no instructions on second degree burglary. Like the situation in *Mendoza*, the parties here

essentially stipulated prior to the instructions being given to the jury that they would only be instructed on first degree burglary.[7] As such, the only verdict the jury could return in the instant case was first degree burglary. (*People v. Mendoza*, *supra*, 23 Cal.4th at p. 901.)

Based on the foregoing, the robbery must be reduced to second degree but both defendants were properly convicted and sentenced on first degree burglary.

V

PAROLE REVOCATION FINE

Defendants claim imposition of the parole revocation fines was error because they were given LWOP sentences that had no period of parole. In sentencing Pulido and Garcia Jr., the trial court imposed restitution fines in the amount of $2,000 pursuant to sections 1202.4 and 1202.45.[8] It noted that the section 1202.45 fine was stayed pending completion of the term of imprisonment and any parole, "if the defendant were ever granted parole." "When there is no parole eligibility, the fine is clearly not applicable." (*People v. Oganesyan* (1999) 70 Cal.App.4th 1178, 1183.) However, the issue is moot because we have vacated defendants' LWOP sentences and the matters are being remanded for resentencing.

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[7] Garcia Jr. argues that this was not a stipulation but it clearly was an agreement that the jury would only be instructed on first degree burglary.

[8] Section 1202.45 provides, in pertinent parts, as follows: "In every case where a person is convicted of a crime and . . . his . . . sentence includes a period of parole, the court shall . . . assess an additional parole revocation restitution fine . . . "

VI

DISPOSITION

Defendants' LWOP sentences are vacated and the matters are remanded to the superior court for resentencing consistent with the views expressed in *Miller* and in this opinion. Upon resentencing, the trial court shall reflect that the robbery convictions were of the second degree. The judgment is otherwise affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

McKINSTER
Acting P. J.

CODRINGTON
J.